FILED
JUL 8 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term 1955

No. 214

NATALIE ORTIZ TORRES,

Petitioner,

AGAINST

HONORABLE LAWRENCE E. WALSH,
United States District Judge,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

EDWARD A. MARTIN,
927 Munsey Building,
Washington, D. C.

JEROME GOLENBOCK,
DONALD S. SHERWOOD,
225 Broadway,
New York, N. Y.
Counsel for Petitioner.

LOEB APPEAL PRESS, INC., 65 Duane Street, N. Y. C. WOrth 2-0689

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Petitioner, Natalie Ortiz Torres prays that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on April 13th, 1955.

Citations to Opinions Below

The opinion of United States District Judge Lawrence E. Walsh in the United States District Court for the Southern District of New York in the action of Natalie Ortiz Torres against A. H. Bull Steamship Company, is reported at 125 F. Supp. 496, and is printed in Appendix B, hereto, *infra*, pages 12-14. The opinion of the United

States Court of Appeals for the Second Circuit is reported at 221 F. 2d 319 and is printed in Appendix B, hereto, *infra*, pages 15-20.

Jurisdiction

The decision of the Court of Appeals was entered on April 13th, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254 (1).

The jurisdiction of the District Court was invoked under the authority of Section 1333 of the Judicial Code, as this is an admiralty cause brought by the libelant to recover damages for personal injuries sustained as a result of the negligence of the *in personam* respondent, A. H. Bull Steamship Company and the unseaworthiness of the steamship *SS Rosario*. Jurisdiction of the United States Court of Appeals for the Second Circuit was invoked pursuant to Section 1651 of the Judicial Code.

Questions Presented

1. Whether Section 1404 (a) of Title 28 of the United States Code applies to admiralty proceedings.

2. Whether Section 1404 (a) may be applied to *in rem* admiralty suits.

3. If questions 1 and 2 are answered in the affirmative, whether in an *in rem* admiralty suit, the consent of the respondent-shipowner whose vessel was not seized in the proposed transferee court is sufficient basis for the transferring court to say that the action "might have been brought" in the transferee district and whether such consent by the moving party only gives the transferring court authority to order the transfer or give the transferee court power over *the res*.

Statute Involved

The statutory provision involved is Section 1404 of the Judicial Code. It is printed in Appendix A, *infra*, page 11.

Statement

The libelant, petitioner herein, instituted a suit in admiralty to recover damages for personal injuries sustained by him aboard the *SS Rosario* on August 18, 1953, while the vessel was in port at Puerto Rico. The suit was commenced in the United States District Court, Southern District of New York. Jurisdiction *in personam* was obtained by personal service upon the A. H. Bull Steamship Company on June 17, 1954 in New York. The libelant attached the *SS Rosario in rem* within the territorial waters of the United States District Court for the Southern District of New York, thus obtaining *in rem* jurisdiction. The A. H. Bull Steamship Company appeared in the *in personam* suit and made claim for the vessel in the *in rem* suit.

The vessel was subsequently released from attachment by the posting of a letter of undertaking which stood as *the res* in place of the vessel which was seized.

A. H. Bull Steamship Company moved pursuant to Section 1404 (a) of the Judicial Code for the transfer of this admiralty proceeding from the United States District Court for the Southern District of New York to the United States District Court for the District of Puerto Rico. Libelant opposed the transfer. However, the Honorable Lawrence E. Walsh, a District Judge in the Southern District of New York, permitted the transfer. Subsequently, the libelant moved in the United States Court of Appeals for the Second Circuit for the issuance of a

writ of mandamus and/or prohibition against the District Judge prohibiting the transfer, arguing that the District Court below was without power or authority to order the transfer, inasmuch as Section 1404 (a) does not apply to admiralty suits and more particularly does not apply to *in rem* admiralty proceedings and that therefore he had no power or authority to order the transfer, and the District Court in Puerto Rico would have no jurisdiction either *in personam* or *in rem*.

Reasons for Granting the Writ

1. The decision of the court below in permitting the District Court to apply Section 1404 (a) to an *in rem* admiralty suit conflicts in principal with a decision in the Seventh Circuit Court of Appeals in *Fettig Canning Co.* v. *Steckler, Judge,* 188 F. 2d 715, and a decision in the Fourth Circuit Court of Appeals, *Clinton Foods, Inc.* v. *United States, Clinton Foods, Inc.* v. *Moure, United States District Judge,* 188 F. 2d 289, which determined that Section 1404 (a) of Title 28, United States Code was inapplicable to *in rem* proceedings. The cases in the Fourth and Seventh Circuits involved *in rem* proceedings under the Food and Drug Legislation. However, the principles enunciated in those cases are applicable here. In fact the Fourth Circuit Court of Appeals in the *Clinton Foods* case, *supra,* relied on admiralty doctrine for its determination that:

> " • • • a proceeding *in rem* is local in character and must be brought where the property is subject to seizure under process of the court • • • "

Since the suit for condemnation of the 630 cases of orangeade could not have been brought in any other district than that in which they were seized, it is clear that

it may not be transferred from that district under the provisions of 28 U. S. C. A. Section 1404 (a).

In *Fettig Canning Co.* v. *Steckler,* 188 F. 2d 715, the court refused to issue a writ of mandamus against the Honorable William E. Steckler, Judge of the United States District Court for the Southern District of Indiana, who on his own motion ordered that an *in rem* food seizure suit be remanded to the Eastern District of Missouri, the transferring court, even though the United States Attorney and the claimant had consented to transfer, and even though the goods had emanated from Indiana and might have been seized there.

Jurisdiction over the subject matter of the action is exclusively in the district wherein *the res* was seized, and waiver or consent by one or both parties does not create jurisdiction in another District Court.

The Second Circuit of Appeals stated below:

> "As a proceeding in admiralty has been held to be included in the phrase 'any civil action', it is probable that we could hold that the transfer of an in rem, admiralty case to a court having no jurisdiction or power over the res was unauthorized, although the question is not entirely free from doubt. But we do not reach that question here as the respondent-claimant has agreed voluntarily to appear in the action in the District Court of Puerto Rico, * * * "
>
> (See Opinion of Court of Appeals)

In *Fettig Canning Co.* v. *Steckler,* 188 F. 2d 715 at 719, the Court of Appeals for the Seventh Circuit stated:

> "Petitioner cites a number of cases in support of the proposition that venue may be waived by the parties where the court has jurisdiction of the

subject matter. There is no point in citing or discussing such cases for the reason that the subject matter of the involved actions was the seized articles, of which the Indiana court never acquired jurisdiction. Under such circumstances, we are of the view that the parties consent to venue was without effect."

2. The questions presented are of great importance in the application of the transfer provisions of the Judicial Code. If the transferee court does not have valid jurisdiction of an action, its decrees have no validity, and at any stage of the judicial proceedings the transferee district court, and the appellate courts may *sua sponte* find that they have no jurisdiction, and consequently, no power to render effective final or binding decrees upon the parties or the subject matter of the action.

The question of the application of Section 1404 to admiralty suits should be resolved with finality. Does the decision of the court mean that admiralty suits are encompassed within the section of the Judicial Code here in question?

If it is determined that admiralty suits generally fall within the phrase "any civil action" of Section 1404 (a) do *in rem* admiralty suits fall within the purview of that section?

The court below stated that

> "• • • it is probable that we would hold that the transfer of an in rem admiralty case to a court having no jurisdiction or power over the res was unauthorized although the question is not entirely free from doubt."

The court avoids a resolution of the problem by finding that inasmuch as the respondent-claimant voluntarily agrees to appear in the action in Puerto Rico

> "there appears to be no difficulty on the score of venue * * *."

The Court of Appeals determined that the district court had the power to make the order of transfer.

3. The decision of the Court below is erroneous.

The Federal Courts are courts of limited jurisdiction and have such powers as are conferred upon them by Congressional grant; consent or waiver of the parties being unable to confer jurisdiction or otherwise create a power in the court. The Legislative history of Section 1404 would seem to indicate that Congress did not intend to include admiralty proceedings within the purview of Section 1404 (a) of the Code. Sub-division (a) of 1404 of the Judicial Code was based upon Section 119 of Title 28 U. S. C. (1946 ed.). That section did not refer to or include

> "any * * * suit * * * libel * * * or other judicial business * * * in admiralty * * * or * * * in rem * * *".

as did Section 163 of Title 28, U. S. C. (1946 ed.), upon which is based subsection (b) of Section 1404, of the Judicial Code.

The reviser's note to Section 1404 indicates the intention of Congress to permit the transfer of "civil causes", in the revision, "civil action", between Districts rather than only divisions of the same district. The revision now permits a transfer on motion for the purposes and ends specified in subsection (a) of Section 1404, Title 28, U. S. C. (1948 ed.), even where one of the parties refuses

to stipulate and opposes transfer. The transferee court must however, have complete jurisdiction of the cause, and the District Court in Puerto Rico has no power over the *res* where the proceeding is *in rem*.

In the instant case only the District Court in New York can have jurisdiction over *the res* inasmuch as a proceeding *in rem* is local in nature and only that district in which the *res* is actually seized can actually have jurisdiction over the subject matter.

If Section 1404 (a) does not provide for the transfer of admiralty proceedings or *in rem* admiralty suits and if it does not provide for the creation of the power over the *res* in the transferee district, consent to transfer by the respondent in the district court or a waiver of jurisdiction does not give the transferring court power or authority to order a transfer nor does the transferee court obtain jurisdiction over the *res*.

The court of appeals below did not pass upon the applicability of the section herein in question as to *in rem* admiralty proceedings because it held that

> "as the respondent-claimant has agreed voluntarily to appear in the action in the District Court of Puerto Rico, there appears to be no difficulty on the score of venue."

Section 1404 (a) provides for the transfer of a cause where the convenience of the parties and witnesses will be served and if it will be in the interests of justice.

However, such transfer may only be to a district or a division where it might have been brought. May an action be transferred to a district where the respondents were not subject to suit and to a district other than that where the *res* was actually seized?

It is an elementary rule of statutory construction that the legislature is presumed to have used no superfluous words or phrases and that significance should ordinarily be given to every word and section of a statute.

Consequently, there must be some meaning ascribed to the phrase "where it might have been brought" as used in paragraph (a) of Section 1404 of the Judicial Code.

"Where it might have been brought", must mean only a district where the *in personam* respondent was subject to the *in personam* service and where *the res* was actually attached. If Congress intended to permit the transfer of an action to any district or division that would be most convenient for the parties and witnesses and where the interests of justice would best be served they need not have said "where it might have been brought." Consequently, consent of the moving parties to voluntarily appear in the proposed transferee district does not in any way create a power in the transferring court to order a transfer unless in fact the moving party was in fact subject to *in personam* service in the transferee district, or if the *res* was seized there. However, in an *in rem* proceeding, the maritime lien is inchoate and becomes secure only when *the res* is actually seized.

An admiralty proceeding is local in nature and only that court in whose waters the vessel was in fact seized has jurisdiction over the *res*.

"The proper forum is the *locus rei sitae*."

The Jerusalem, Fed. Cas. No. 7, 293 (C. C. D. Mass, 1814).

An *in rem* proceeding in admiralty can be only in the district in which the vessel is found and actually seized and unless the vessel is seized, there can be no *in rem* jurisdiction. Consent cannot create jurisdiction or power in a district court. The presence of the *res* is that which

gives the court jurisdiction. This is a matter of power and the parties by their own actions cannot confer jurisdiction in a federal district court.

In *Puget Sound Tug & Barge Company*, 106 F. Supp. 492 (D. C. D. Ore. 1952) the United States District Court for the District of Oregon ruled that Section 1404 (a) of the Judicial Code did not apply to Admiralty.

The Supreme Court in *Atkins* v. *The Disintegrating Company*, 18 Wall 272 (1873) determined that there was no inconsistency in the non-application of general practice statutes or of particular sections thereof to admiralty.

In the food and drug legislation (21 U. S. C. A. 334 et seq.) provision is made for the transfer of seizure cases from one district court to another where certain prerequisites are met. After providing for the power of transfer, jurisdiction over *the res* is granted to the transferee court by virtue of 21 U. S. C. A. 334 (para. f).

> "In the case of removal for trial of any case as provided by subsection (a) or (b) * * *
>
> (2) The court to which such case was removed shall have the powers and be subject to the duties, for purposes of such case, which the court from which the removal was made would have had, or to which such court would have been subject if such case had not been removed."

By adding paragraph (f) to Section 334, Congress requested that unless there is a specific grant of power to a District Court over *the res*, there can be no jurisdiction.

It is an elementary rule of statutory construction that the legislature is presumed to have used no superfluous words or phrases and that significance should ordinarily be given to every word and section of a statute.

If Congress intended to provide for the transfer of an *in rem* proceeding under Section 1404 (a) of the Judicial Code, it would have made a provision similar to paragraph (f) of Section 334 of Title 21 U. S. C. A. Congress by not having conferred jurisdiction and power over *a res* in a transferee district indicates a lack of intent to include *in rem* admiralty proceeding within the section in question. It is only in paragraph (b) of Section 1404 of the Judicial Code that transfer of *in rem* proceedings are provided for.

It would seem that the District Court erred in ordering the transfer and that it acted without power or authority and that the Circuit Court erred in sanctioning the order of transfer.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

EDWARD A. MARTIN,
JEROME GOLENBOCK,
DONALD S. SHERWOOD,
Counsel for Petitioner.

APPENDIX A

Statutory Provisions

SECTION 1404, TITLE 28

§ 1404. Change of venue

(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

(b) Upon motion, consent or stipulation of all parties, any action, suit or proceeding of a civil nature or any motion or hearing thereof, may be transferred, in the discretion of the court, from the division in which pending to any other division in the same district. Transfer of proceedings in rem brought by or on behalf of the United States may be transferred under this section without the consent of the United States where all other parties request transfer.

(a) A district court may order any civil action to be tried at any place within the division in which it is pending. June 25, 1948, c. 646, 62 Stat. 937.

APPENDIX B

Copies of Opinions and Judgments Below

Reported at 125 Fed. Supp. 496

NATALIE ORTIZ TORRES,

Libelant,

v.

STEAMSHIP ROSARIO, her engines, boilers, etc., and A. H. BULL STEAMSHIP COMPANY,

Respondent.

United States District Court,
Southern District of New York.
Oct. 18, 1954.

WALSH, District Judge.

This is a libel *in rem* against the Steamship "Rosario" and *in personam* against the A. H. Bull Steamship Company. The vessel was arrested in this district and subsequently released upon the posting of a letter of undertaking in lieu of bond.

Respondent A. H. Bull Steamship Company now moves to transfer the action to the District Court for Puerto Rico under 28 U. S. C. § 1404 (a). The motion is granted.

The convenience of the parties and the interest of justice will be served by the transfer. Plaintiff is a resident of Puerto Rico; the injury occurred there; the doctors by whom he was treated reside there; the vessel plies regularly between Puerto Rico and New York and the members

of her crew, who are witnesses, are as readily available to Puerto Rico as to New York; the Puerto Rican witnesses are beyond the distance within which this court could compel their attendance for trial. Fed. Rules Civ. Proc. rule 45, 28 U. S. C. A.

Libelant opposes the transfer on the ground that this statute is inapplicable to an admiralty action *in rem* and therefore the Court is without power to order it.

Section 1404 (a) permits the transfer of an action to any other district "where it might have been brought". It has been established in this circuit that there are two requirements for transfer under this statute. The transferee court must be one in which proper venue can be laid and one which will have jurisdiction over the defendant. Foster-Milburn Co. v. Knight, 2 Cir., 181 F. 2d 949. To establish jurisdiction the defendant must either be amenable to the service of process in the transferee district or he must consent to enter a general appearance there. Anthony v. Kaufman, 2 Cir., 193 F. 2d 85. It is not sufficient for this purpose that the defendant could be served there should he ever come to that district. Foster-Milburn Co. v. Knight, supra.

As long as a decree *in rem* can be entered by the court to which transfer is sought, the difference in the nature of an *in rem* proceeding does not prevent giving full effect to the policy of the statute.

In the present case the ship could have been arrested as easily in Puerto Rico as in this district. Since it was not it can be made subject to the jurisdiction of the District Court for Puerto Rico by the filing of a bond or stipulation there.

The food and drug cases cited by libelant as authority for his contention that the court lacks power to order this transfer as distinguishable in two important respects. The statute under which they are brought itself provides that the article must be condemned in the district court

within which they are found. 21 U. S. C. A. § 334. Furthermore, in those cases the offending articles were in the actual custody of the court to assure their destruction whereas in a proceeding like that now before the court the seizing of the vessel is merely a procedure for insuring the satisfaction of a money judgment and the vessel is actually released upon the filing of a bond or undertaking.

The statute was designed to remedy the evils of forum shopping. Ex parte Collett, 337 U. S. 55, 69 S. Ct. 944, 93 L. Ed. 1207; U. S. v. National City Lines, 337 U. S. 78, 69 S. Ct. 955, 93 L. Ed. 1226. It has been held applicable to admiralty actions *in personam*. Arrowhead Co. Inc. v. The Aimee Lykes, 2 Cir., 193 F. 2d 83. By reasonable interpretation it extends to admiralty proceedings *in rem* as well.

Motion granted on the condition that bond or stipulation be filed by the claimant of the vessel "Rosario" to be subject to any judgment libelant recovers in the District Court for Puerto Rico.

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NATALIE ORTIZ TORRES,

Petitioner,

AGAINST

HONORABLE LAWRENCE E. WALSH,
United States District Judge,

Respondent.

In the Matter of the Application

of

THE PENNSYLVANIA RAILROAD COMPANY,

Petitioner,

for a writ of mandamus, or a writ of prohibition, or both,

AGAINST

HON. ARCHIE O. DAWSON, District Judge of the United States District Court for the Southern District of New York and said United States District Court,

Respondents.

Before Frank and Medina, Circuit Judges, and Brennan, District Judge.

Proceedings for writs of mandamus and/or prohibition to review an order by Judge Walsh transferring a libel in admiralty from the District Court for the Southern

District of New York to the District of Puerto Rico and an order of Judge Dawson directing transfer of an action from the Southern District of New York to the United States District Court for the Middle District of Pennsylvania. Reported below, *Torres* v. *The Rosario*, 125 F. Supp. 496; *Thompson Products, Inc.* v. *The Pennsylvania Railroad Company*, 127 F. Supp. 449.

MEDINA, Circuit Judge:

These two companion cases, argued on February 14, 1955, serve as illustrations of the law in this Circuit applicable to mandamus and prohibition applications in transfer cases under Section 1404 a.

In the *Pennsylvania Railroad Company* case, plaintiff's goods, shipped from Waynesboro, Pennsylvania, to Cleveland, Ohio, were damaged in transit; and plaintiff sued the railroad in the United States District Court for the Southern District of New York, which had jurisdiction of the person of the defendant and of the subject matter of the action. The transaction occurred in Pennsylvania; most of the witnesses were in Pennsylvania. These facts were known to the plaintiff from the beginning; but it chose to sue in the Southern District of New York. Later it was discovered that the damage to the freight might have been caused by the fault of the shipper, Landis Tool Company, at Waynesboro. Accordingly, as the action could have been brought in the United States District Court for the Middle District of Pennsylvania, plaintiff moved under section 1404a to transfer the case to Pennsylvania, in order to join Landis Tool Company as a co-defendant with the railroad, to amend the complaint and to pray for judgment in the alternative against one defendant or the other or both, as the evidence might disclose the negligence of either or both. Obviously, this would serve the convenience of parties and witnesses; but

this had been clear all along, and plaintiff, who was the moving party, had chosen to sue in New York. It seems that a discontinuance and the bringing of a new action in Pennsylvania was no solution to plaintiff's problem, as the one-year period of limitations provided in the Bill of Lading had expired. Thus in deciding whether the transfer was "for the convenience of parties and witnesses, in the interest of justice," Judge Dawson had to give consideration in the aggregate to such matters as: the making of the motion for transfer by plaintiff rather than by defendant, as is almost always the case; issues of veracity raised by the supporting and opposing affidavits; and the desire of plaintiff to amend and join a new party defendant after the transfer. In arriving at a conclusion he is said to have exercised his discretion and, if the order were appealable, this court would have power to reverse for abuse of discretion, as in the case of other appealable interlocutory orders.

In the *Torres* case libellant was a "longshoreman-seaman" aboard the SS Rosario; he was injured in Puerto Rico where the vessel was at the time of the accident and all or practically all the witnesses are in Puerto Rico. But, perhaps because District Judges sitting in admiralty here were thought to be more generous than those in Puerto Rico, this proceeding was commenced in the United States District Court for the southern district of New York, where personal service of citation was made and a monition issued, pursuant to which the vessel was seized and released upon the filing of the usual undertaking. The claimant-respondent, perhaps also thinking the judges in Puerto Rico might award a less ample recovery, and relying on the obvious convenience of "parties and witnesses", moved under Section 1404a to transfer the case to Puerto Rico. This raised the question of whether an in rem proceeding in admiralty

was within the scope of section 1404a, a matter of statutory interpretation, and also the question of whether the District Court in Puerto Rico would have power to proceed in rem. While it did appear that the vessel had frequently been in the territorial waters of Puerto Rico, it was equally clear that no attempt had been made to seize her there, and the only jurisdiction in rem was that of the District Court in New York.

The first question is whether the District Judge has exceeded his power under section 1404a, by transferring the case to a district where it might not have been commenced originally. Section 1404a, it will be recalled, authorizes a transfer only "to any other district or division where it might have been brought." While in a sense it is true that an in rem proceeding might have been brought in Puerto Rico, as the vessel had been there from time to time, it may not be doubted that the Congress intended no transfer in any case where the transferee court lacked competence to proceed. As a proceeding in admiralty has been held to be included in the phrase "any civil action,"[1] it is probable that we would hold that the transfer of an in rem admiralty case to a court having no jurisdiction or power over the res was unauthorized, although the question is not entirely free from doubt. But we do not reach that question here as the respondent-claimant has agreed voluntarily to appear in the action in the District Court of Puerto Rico, there appears to be no difficulty on the score of venue, and the Judge granting the transfer has provided in his order that the transfer shall be effec-

1. *Arrowhead Co. Inc., et al.* v. *The Aimee Lykes, et al.*, 193 F. 2d 83 (C. A. 2, 1951); *Internatio-Rotterdam, Inc.* v. *Thomsen*, 218 F. 2d 514 (C. A. 4, 1955); *Becker et al.* v. *Lykes Bros. S.S. Co., Inc.*, 119 F. Supp. 408 (S. D. N. Y., 1953); *St. Paul Fire and Marine Ins. Co.* v. *American Mail Line Ltd.*, 94 F. Supp. 28 (S. D. N. Y., 1950); cf. *Ex Parte Collett*, 337 U. S. 55 (1949); *United States* v. *National City Lines*, 337 U. S. 78 (1949).

tive only upon the filing of a bond or stipulation by the claimant of the SS Rosario to pay any judgment or decree recovered against the vessel. Accordingly, we conclude that there was no lack of power to make the order, the District Court of Puerto Rico will be in effect a court where the action might have been brought.

The answer is similarly in the negative in the *Pennsylvania Railroad Co.* case, where it is not disputed that the action might originally have been brought in Pennsylvania.

Our only power to entertain and grant mandamus or prohibition applications is "in aid of" our appellate jurisdiction as provided in the All Writs Act (28 U. S. C. Sec. 1651), and our interference is justified "to compel an inferior court to relinquish a jurisdiction which it could not lawfully exercise or to exercise a jurisdiction which it had unlawfully repudiated,"[2] also in what the Supreme Court has characterized as "really extraordinary causes,"[3] of such character that action by an appellate court may be deemed absolutely necessary and essential to the effective exercise of its appellate powers at some later stage of the proceeding. We have already held that, where the transfer has been made to a district in which the action could originally have been brought, we are not called upon to act "in aid of" our appellate jurisdiction, except when we found it necessary to do so in a "really extraordinary cause", *Magnetic Engineering & Mfg. Co.* v. *Dings Mfg. Co.*, 178 F. 2d 866, 869 (C. A. 2, 1950), where it was said by Learned Hand, then Chief

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2. *Roche* v. *Evaporated Milk Ass'n*, 319 U. S. 21, 32 (1943).

3. See, e. g., *Bankers Life and Cas. Co.* v. *Holland*, 346 U. S. 379 (1953); *Ex Parte Fahey*, 332 U. S. 258 (1947); *Roche* v. *Evaporated Milk Association*, 319 U. S. 21 (1943); *Ex Parte Roe*, 234 U. S. 70 (1914); *Ex Parte Harding*, 219 U. S. 363 (1911); see also, *Alcoa Steamship Co., Inc.* v. *Ryan and Knox*, 211 F. 2d 576 (C. A. 2, 1954).

Judge of this court: "We do not believe that our power to protect our own jurisdiction extends to protecting it as against the jurisdiction of another federal court of equal jurisdiction * * * ". And this is confirmed by the action taken in a transferred case by the Fourth Circuit in *Internatio-Rotterdam, Inc.* v. *Thomsen,* 218 F. 2d 514 (C. A. 4, 1955), where Chief Judge Parker significantly remarked, at p. 517, "The courts of the United States comprise one great system for the administration of justice."

Accordingly, we may not consider the composite questions of whether these district judges abused their discretion in granting these transfer applications, unless we find that either or both of these two causes are "really extraordinary." This is the second question which we must decide. But there is not the slightest basis for holding that either of these cases is "really extraordinary", or "extraordinary" in any sense. They are the ordinary, run-of-the-mill type of litigation which goes through the District Courts from day to day.

Thus we do not reach nor do we decide the questions of alleged abuse of discretion which it would be necessary for us to decide if it were within our power to consider on the merits, as upon an appeal, whether it was error to issue these orders.

Petitions denied.

APPENDIX C

Conflicting Opinions

FETTIG CANNING CO. v. STECKLER, Judge.

No. 10324.

United States Court of Appeals
Seventh Circuit.

Heard March 2, 1951.

Decided March 21, 1951.

Writ of Certiorari Denied June 4, 1951.

See 71 S. Ct. 1019.

Before Major, Chief Judge, and Duffy and Finnegan, Circuit Judges.

MAJOR, Chief Judge.

This matter is here by reason of an order heretofore entered by this court directing respondent, a Judge of the United States District Court for the Southern District of Indiana, to show cause why such court should not retain jurisdiction of the cases subsequently referred to. The show cause order issued in response to a petition for mandamus. Respondent, in answer to the petition, prayed that the relief requested be denied and the petition for mandamus dismissed. The cases are two actions brought by the United States of America as libels of information

in the United States District Court for the Eastern District of Missouri, Eastern Division, numbered 6863 and 6923, being entitled "United States of America v. 311 cases Tomato Catsup" and "United States of America v. 105 cases of Tomato Catsup." The libels were instituted under Title 21 U.S.C.A. § 334, of the Federal Food, Drug, and Cosmetic Act, and the libeled goods were seized by the government within the jurisdiction of the Missouri District.

Petitioner Fettig Canning Company appeared in that court as claimant of the seized products and requested that the actions be transferred to the Southern District of Indiana, under the provision of Title 28 U.S.C.A. § 1404(a). The United States District Attorney for the Missouri District entered his consent and an order of transfer was accordingly entered. The seized goods were not transferred but remained in the jurisdiction of the Missouri court.

The transfers were appropriately docketed by the Indiana court, claimant answered the informations and the cases thus being at issue were set for trial. A jury was empaneled and part of the government's evidence heard, when the court on its own motion ordered "that the above causes, be and each cause is, hereby remanded to the Eastern District of Missouri, Eastern Division, for lack of jurisdiction." Thereupon, the jury was discharged but the order of remand was held in abeyance pending determination by this court of the question of the District Court's jurisdiction.

Petitioner contends that the Missouri court, under Title 28 U.S.C.A. §1404(a), was authorized to make the transfers and that the Indiana court thereby acquired jurisdiction, and further, that the place of trial being one of venue rather than jurisdiction, no question can be raised in view of the fact that the parties consented to the South-

ern District of Indiana as the forum for trial. § 1404(a), entitled "Change of venue", provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division *where it might have been brought.*" (Italics ours.)

The instant controversy turns entirely upon the scope to be given the italicized words. The libeled goods were introduced into commerce by petitioner at Elwood, Indiana, within the jurisdiction of the Southern District of that State, and shipped by it to a point within the Missouri District where they were seized. Petitioner contends that the libel actions might have been brought either in the District of Indiana wherein the shipment originated or in any other District through which the goods passed on their journey to Missouri, the place where they were seized. Respondent contends to the contrary, that is, that no action could have been brought prior to the time the goods were seized, and that the Missouri court was the only court which could or did acquire jurisdiction.

Petitioner relies almost *in toto* upon the construction which the Supreme Court has placed upon § 1404(a) in two recent decisions. Ex Parte Collett, 337 U. S. 55, 69 S. Ct. 944, 959, 93 L. Ed. 1207; United States v. National City Lines, 337 U. S. 78, 69 S. Ct. 955, 959, 93 L. Ed. 1226. In the Collett case, it was held that § 1404(a) was applicable to actions under the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq., and in the National City Lines case, to civil suits by the government against corporations under the anti-trust laws. The controlling and determining factor, as we understand, in each of these cases was that the application of § 1404(a) did not modify or alter the existing rights of the parties, in one instance the rights as fixed by the Federal Employers' Liability Act, and in the other case the rights as fixed by the anti-

trust laws. In the Collett case, the court stated, 337 U. S. at page 59, 69 S. Ct. at page 947, "Obviously, the express language gives no clue as to where the action 'might have been brought' ", and in sustaining the right of transfer the court stated, 337 U. S. at page 60, 69 S. Ct. at page 947, "Section 1404(a) does not limit or otherwise modify any right granted in § 6 of the Liability Act or elsewhere to bring suit in a particular district. An action may still be brought in any court, state or federal, in which it might have been brought previously."

In each case the transfer was to a District "where it might have been brought." There is nothing in these cases which holds or indicates that § 1404(a) was or would be applicable in the absence of this essential factor. In other words, the question as to the District "where it might have been brought" has been left untouched by these decisions, and the instant issue being whether the transferred actions were such as "might have been brought" in the Indiana District, the cited Supreme Court decisions furnish little, if any, support to petitioner's contention.

Title 21 U.S.C.A. § 334(a), on which the involved actions were predicated, provides, "Any article of food * * * that is adulterated or misbranded when introduced into or while in interstate commerce * * * shall be liable to be proceeded against while in interstate commerce, or at any time thereafter, on libel of information and condemned *in any district court of the United States within the jurisdiction of which the article is found* * * *." (Itlaics ours.) A proviso of this paragraph provides for the transfer of cases under certain enumerated circumstances, none of which it is claimed or appear to be relevant to the instant situation.

No authority need be cited for the proposition that the jurisdiction of a Federal court is limited to that which

Congress has expressly conferred. In view of the plain and unambiguous directive contained in the provision above quoted (italicized), it is not discernible how jurisdiction could be acquired by a District Court other than the one in whose territory the adulterated or misbranded articles were found. Jurisdiction has been made to depend upon that incident. A libel proceeding is one in rem against the contraband article, which is treated as the offender. Cf. Hipolite Egg Co. v. United States, 220 U. S. 45, 57, 31 S. Ct. 364, 55 L. Ed. 364. The basis of all jurisdiction in rem is the court's actual or constructive possession; the res must be within the reach of the court. United States v. Mack, 295 U. S. 480, 484, 55 S. Ct. 813, 79 L. Ed. 1559; Strong v. United States, 1 Cir., 46 F. 2d 257, 260, 79 A. L. R. 150.

We suppose it is true, as petitioner contends—at least, we assume that such is a fact—that the libeled articles were subject to seizure within the Southern District of Indiana, but even so, it is not apparent how this is of any aid to petitioner's position. Congress has not seen fit to make jurisdiction dependent upon where the seizure might have taken place but has expressly conferred jurisdiction upon the court of the District wherein the articles are found.

Petitioner's contention fails to evaluate the nature of the action and that the offender is the res against which the action is aimed. A reading of the Act emphasizes the distinction which Congress has apparently drawn between actions in personam and those in rem. § 331 enumerates the prohibited acts, among which is "the adulteration or misbranding of any food, drug, device, or cosmetic in interstate commerce." § 332 confers jurisdiction upon District Courts to restrain violations of § 331. § 333 provides that any person who violates any of the provisions of § 331 shall be guilty of a misdemeanor and subject to

the penalties therein prescribed. Evidently both § 332 and § 333 are directed at the offending person and we suppose the District Court of Indiana or any court through whose District the libeled goods were carried would have jurisdiction under these sections. But when we come to § 334, the one here involved, the proceeding is directed at an article and not a person, and while the person who claims to be the owner or interested in the libeled goods is permitted to come in as a claimant, it is not necessary that such person be a party to the proceeding. All that is required is that the libeled article be found in the District, and this limitation upon jurisdiction appears to have been imposed deliberately and not as a result of any inadvertence.

§ 334(d) provides for the character of decree which a court may enter in a libel proceeding. The goods may be ordered destroyed or disposed of in numerous ways therein provided. It is significant that Congress has made no provisions by which such a decree could be made effective beyond the territory of the District wherein the case was tried. It has been held that under general provisions of law a United States District Court cannot issue process beyond the limits of the District. Robertson v. Railroad Labor Board, 268 U. S. 619, 622, 45 S. Ct. 621, 69 L. Ed. 1119. If this is the law, as we think it is, a trial of the involved actions would be futile in the absence of authority to enter a decree effective against the seized articles located in Missouri.

Petitioner makes an appealing argument that the purpose of § 1404(a) was to relieve hardships incident to the expense and inconvenience occasioned by a litigant being required to try a case far removed from his home or place of business. Undoubtedly such was the purpose of the statute, as was recognized by the Supreme Court in the Collett and National City Lines cases, but even so, such

argument is no aid to a solution of the jurisdictional issue with which we are presented. It is an argument which may more appropriately be directed to Congress than to the courts.

There are called to our attention a number of District Court decisions (mostly unpublished) which have taken the same view of the instant question as did the respondent. A well reasoned opinion with which we agree is that of United States v. 23 Gross Jars, etc., 86 F. Supp. 824, 825, in which the court stated: "This libel having been brought under favor of 21 U.S.C.A. § 334, the articles may be condemned 'in any district court of the United States within the jurisdiction of which the article is found.' Since the articles were found in the Western District of Pennsylvania this action only could be commenced in that district. It could not, under Section 334, have been brought in this district. Since this is so and since Section 1404(a) may only be used to transfer actions to districts where they could have been brought, it follows that section 1404(a) could not be used to transfer this action here."

Petitioner cites a number of cases in support of the proposition that venue may be waived by the parties where the court has jurisdiction of the subject matter. There is no point in citing or discussing such cases for the reason that the subject matter of the involved actions was the seized articles, of which the Indiana court never acquired jurisdiction. Under such circumstances, we are of the view that the parties' consent to venue was without effect.

In our judgment, respondent correctly held that the Indiana court was without jurisdiction and that the remanding order was proper. The relief prayed for is, therefore, denied, and the petition dismissed.

CLINTON FOODS, INC. v. UNITED STATES.

CLINTON FOODS, INC. v. MOORE,
United States District Judge.

Nos. 6209, 6210.

United States Court of Appeals
Fourth Circuit.

Argued March 13, 1951.

Decided April 2, 1951.

Before Parker, Chief Judge, Soper, Circuit Judge, and Watkins, District Judge.

PARKER, Chief Judge.

We have here an appeal from an order denying, on the ground of lack of power, a motion to transfer a condemnation proceeding from one federal district to another and a petition for a writ of mandamus to require the judge below to exercise the power. In April 1950 the United States instituted a condemnation proceeding under the Federal Food, Drug and Cosmetic Act, 21 U.S.C.A. § 301 et seq. in the United States District Court for the Southern District of West Virginia against 630 cases of orangeade found within the District, on the ground that the orangeade was both misbranded and adulterated within the prohibition of the statute. Clinton Foods, Inc., intervened as owner in the condemnation proceeding and filed answer denying the charges of misbranding and adulteration. It subsequently made a motion that the case be transferred for trial to the District of Maryland; but this was denied by the District Judge on the ground that he had no power to order the transfer. Appeal was taken from this denial of the motion and, in addition, Clinton Foods has filed a petition in this court asking a writ of mandamus against the District Judge on the ground that he had power to grant the motion and should have exercised his discretion in passing upon it. The United States has moved to dismiss the appeal on

the ground that the order denying the motion to transfer is not a final order within the meaning of the statute allowing appeals to this court.

The motion to dismiss the appeal must be allowed. Appeals to this court may be taken only from final decisions, 28 U.S.C.A. § 1291, except where appeal from interlocutory orders in injunction, receivership, admiralty, and patent cases is expressly authorized by statute, 28 U.S.C.A. § 1292; and an order granting or refusing the transfer of a case is clearly not a final decision or is it an interlocutory order from which appeal is expressly granted. As said by this court in Cox v. Graves, Knight & Graves, Inc., 4 Cir., 55 F. 2d 217, 218; "A final decision is one which 'puts an end to the suit, deciding all the points in litigation between the parties, leaving nothing to be judicially determined, with nothing remaining to be done, but to enforce by execution what has been determined.' France & Canada S. S. Co. v. French Republic, 2 Cir., 285 F. 290, 294; U. S. v. Bighorn Sheep Co., 8 Cir., 276 F. 710."

The precise question was before us in Jiffy Lubricator Co. v. Stewart-Warner Corp., 4 Cir., 177 F. 2d 360, 361, certiorari denied 338 U. S. 947, 70 S. Ct. 484, in which an appeal from an order transferring a case was dismissed, and one of the grounds of the dismissal was that the order was not final and appealable. We said in that case:

"The motion to dismiss must be granted on the ground that the order transferring the case is not a final order from which an appeal lies under 28 U.S.C.A. § 1291. As was said by the Supreme Court in Arnold v. United States for use of W. B. Guimarin & Co., 263 U. S. 427, at page 434, 44 S. Ct. 144, at page 147, 68 L. Ed. 371: 'It is well settled that a case may not be brought here by writ of error or appeal in fragments, that to be reviewable a judgment or decree must be not only final, but complete, that is, final not only as to all the parties, but as to the whole subject-matter and as to all the causes of action involved; and that if the judgment or decree be not thus

final and complete, the writ of error or appeal must be dismissed for want of jurisdiction. Hohorst v. (Hamburg-American) Packet Co., 148 U. S. 262, 264, 13 S. Ct. 590, 37 L. Ed. 443; Collins v. Miller, 252 U. S. 364, 370, 40 S. Ct. 347, 64 L. Ed. 616; Oneida Navigation Corporation v. (W. & S.) Job (& Co.), 252 U. S. 521, 522, 40 S. Ct. 357, 64 L. Ed. 697; and cases therein cited.' See also Western Contracting Corp. v. National Surety Corp., 4 Cir., 163 F. 2d 456; Bowles v. Commercial Casualty Ins. Co., 4 Cir., 107 F. 2d 169; Hyman v. McLendon, 4 Cir., 102 F. 2d 189, 190; Fields v. Mut. Benefit Life Ins. Co., 4 Cir., 93 F. 2d 559, 561; Lockhart v. New York Life Ins. Co., 4 Cir., 71 F. 2d 684; Toomey v. Toomey, 80 U. S. App. D. C. 77, 149 F. 2d 19.

"The general rule is well settled that an order granting or refusing change of venue is not appealable unless expressly made so by statute. 3 C. J. p. 473; 4 C. J. S., Appeal and Error, § 115; 2 Am. Jur. 899-900; Shay v. Rinehart & Dennis Co., 116 W. Va. 24, 178 S. E. 272, and cases there cited. There is no federal statute expressly granting an appeal from such orders; and the federal decisions follow the general rule that they are not appealable. Cook v. Burnley, 11 Wall. 659, 672, 20 L. Ed. 84; Kennon v. Gilmer, 131 U. S. 22, 24, 9 S. Ct. 696, 33 L. Ed. 110.

"Counsel for plaintiff rely upon decisions permitting appeals from dismissals in application of the principle of forum non conveniens; but these decisions are not in point. A dismissal in application of that or any other principle puts an end to the action and hence is final and appealable. An order transferring it to another district does not end but preserves it as against the running of the statute of limitations and for all other purposes."

Nothing need be added to what was said in that case. It should be noted, however, that the same view has been taken in all other Circuits where the question has been raised. See Koons v. Kaiser, 2 Cir., 187 F. 2d 1023, certiorari denied 71 S. Ct. 505; Ford Motor Co. v. Ryan, 2

Cir., 182 F. 2d 329; Magnetic Engineering & Mfg. Co. v. Dings Mfg. Co., 2 Cir., 178 F. 2d 866; Paramount Pictures v. Rodney, 3 Cir., 186 F. 2d 111, 116; Shapiro v. Bonanza Hotel Co., 9 Cir., 185 F. 2d 777, 779; Holdsworth v. United States, 1 Cir., 179 F. 2d 933. Not only is it the law, we think, that an order granting or refusing the transfer of a case is not appealable; but this clearly should be the law. To permit appeals as of right from such orders would delay the administration of justice, unnecessarily in most cases, and would open the door to the evils of fragmentary appeals.

Appellant relies upon the decision of the Supreme Court in Cohen v. Beneficial Industrial Loan Corp., 337 U. S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528, in which was sustained the right to appeal from an order denying a motion to require plaintiff in a stockholders derivative suit to give a bond for costs; but that case is clearly not in point. "The right there asserted was in the language of the Supreme Court 'separable from, and collateral to (the cause of) action.' " Shapiro v. Bonanza Hotel Co., supra. "There is absent here a 'final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it.' " Ford Motor Co. v. Ryan, supra [2 Cir., 182 F. 2d 330]. See also Paramount Pictures v. Rodney, supra.

Assuming without deciding that in a proper case this court has power to issue a writ of mandamus[1] to require

1. It is clear that mandamus is not likely to be attended by the delays and other evils incident to fragmentary appeals, since mandamus must be promptly applied for, is granted only in the discretion of the court in aid of its appellate jurisdiction and will be awarded only when the lower court has refused to exercise its jurisdiction or has abused its discretion with regard thereto. Roche v. Evaporated Milk Ass'n, 318 U. S. 21, 26 et seq, 63 S. Ct. 938, 87 L. Ed. 1185. Appeal, on the other hand, if it lies at all, lies as a matter of right and will stay the proceedings of the lower court while it is being prosecuted.

a District Judge to exercise the discretion vested in him by the statute authorizing the transfer of cases. See Roche v. Evaporated Milk Ass'n, 319 U. S. 21, 63 S. Ct. 938, 87 L. Ed. 1185; Paramount Pictures v. Rodney, supra, 3 Cir., 186 F. 2d 111; Ford Motor Co. v. Ryan, supra, 2 Cir. 182 F. 2d 329, we think it clear that this is not a case in which the writ should be granted, as the District Judge was clearly right in holding that he had no power to transfer the case to the District of Maryland. As the case could not have been brought in any other district than that in which the goods sought to be condemned were found, there was no authority to transfer it to another district under 28 U.S.C.A. § 1404(a). Subsection (b) of that section, relating to transfers to other divisions of the same district, confers no such authority. And 21 U.S.C.A. § 334(a), relating to the transfer of misbranding cases does not authorize the transfer, since condemnation is asked here on account of adulteration as well as misbranding.

28 U.S.C.A. § 1404(a) provides: "(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

The condemnation proceeding against the 630 cases of orangeade could not have been brought in any district other than the Southern District of West Virginia, for it was there that the property sought to be condemned was situate. It is well settled that a proceeding in rem against specific property is local in character and must be brought where the property is subject to seizure under process of the court. Keene v. United States, 5 Cranch 304, 3 L. Ed. 108; The Little Ann, Fed. Cas. No. 8,397, 1 Paine 40; The Octavia, Fed. Cas. No. 10,422, 1 Gall. 488; United States v. Three Hundred and Ninety-six Barrels Distilled Spirits, Fed. Cas. No. 16,502; The Idaho, D. C., 29 F. 187, 192. See also 28 U.S.C.A. § 1395(b).

Since the suit for condemnation of the 630 cases of orangeade could not have been brought in any other district than that in which they were seized, it is clear that it may not be transferred from that district under the provisions of 28 U.S.C.A. § 1404(a). United States v. 23 Gross Jars etc. Enca Cream, D. C., 86 F. Supp. 824; United States v. 11 Cases etc. Ido-Pheno-Chon, D. C., 94 F. Supp. 925; United States v. 91 Packages etc. Nutrilite Food Supplement, D. C., 93 F. Supp. 763, 764. As was well said by Judge Fake in the case last cited: "There is no doubt but that the actions under consideration are civil actions, Ex parte Collett, 337 U. S. 55, 69 S. Ct. 944, 959, 93 L. Ed. 1207, but are they such actions as might have been brought in any other districts than those in which they were brought? The answer is, no, because they were brought as actions in rem, and as such could be commenced only where the res was found at the time."

And we think it equally clear that the case could not have been transferred to the Maryland District under 1404(b). That section provides: "(b) Upon motion, consent or stipulation of all parties, any action, suit or proceeding of a civil nature or any motion or hearing thereof, may be transferred, in the discretion of the court, from the division in which pending to any other division in the same district. Transfer of proceedings in rem brought by or on behalf of the United States may be transferred under this section without the consent of the United States where all other parties request transfer."

It is perfectly clear, we think, that this subsection authorizes transfer only between different divisions of the same district. The history of the subsection is thus stated in the Revisor's notes: "Subsection (b) is based upon section 163 of Title 28, which applied only to the district of Maine. This revised subsection extends to all judicial districts and permits transfer of cases between divisions." These notes have been said by the Supreme Court to be

"obviously authoritative," United States v. Nat. City Lines, 337 U. S. 78, 81, 69 S. Ct. 955, 959, 93 L. Ed. 1226; and they make perfectly clear, what should be reasonably clear when reason is applied to the language of the statute itself, that the effect of the subsection is to authorize the transfer of in rem actions between divisions of the district, not to any other district of the country. This is the holdng in all three of the district court decisions last cited.

Nothing in 21 U.S.C.A. § 334(a)[2] authorizes the transfer asked. That section requires condemnation proceed-

2. That section is as follows:

"Any article of food, drug, device, or cosmetic that is adulterated or misbranded when introduced into or while in interstate commerce or while held for sale (whether or not the first sale) after shipment in interstate commerce, or which may not, under the provisions of section 344 or 355, be introduced into interstate commerce, shall be liable to be proceeded against while in interstate commerce, or at any time thereafter, on libel of information and condemned in any district court of the United States within the jurisdiction of which the article is found: Provided, however, That no libel for condemnation shall be instituted under this chapter, for any alleged misbranding if there is pending in any court a libel for condemnation proceeding under this chapter based upon the same alleged misbranding, and not more than one such proceeding shall be instituted if no such proceeding is so pending, except that such limitations shall not apply (1) when such misbranding has been the basis of a prior judgment in favor of the United States, in a criminal, injunction, or libel for condemnation proceeding under this chapter, or (2) when the Administrator has probable cause to believe from facts found, without hearing, by him or any officer or employee of the Agency that the misbranded article is dangerous to health, or that the labeling of the misbranded article is fraudulent, or would be in a material respect misleading to the injury or damage of the purchaser or consumer. In any case where the number of libel for condemnation proceedings is limited as above provided the proceeding pendinig or instituted shall, on application of the claimant, seasonably made, be removed for trial to any district agreed upon by

ings under the Food, Drug and Cosmetic Act for adulteration or misbranding to be brought within the district where the article is found. The proviso, which applies only to libels on account of misbranding, authorizes the limitation to a single proceeding of the proceedings which may be brought for misbranding and the removal for trial of such proceeding. It is significant that the proviso makes no such provision where condemnation is sought on the ground of adulteration, which is ordinarily more serious than misbranding and is more often the basis of a forfeiture of the property. There is no authority in the district court to remove a case under this proviso, as distinguished from consolidating a multiplicity of cases under sec. 334 (b), where adulteration is charged. United States v. 74 cases etc. of Oysters, D. C., 55 F. Supp. 745. And the rule is not different because adulteration along with misbranding is charged in a single libel. United States v. 11 Cases etc. Ido-Pheno-Chon, D. C., 94 F. Supp. 925.

For the reasons stated, the appeal will be dismissed and the petition for writ of mandamus will be denied.

No. 6209, appeal dismissed.

No. 6210, petition for writ of mandamus denied.

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stipulation between the parties, or, in case of failure to so stipulate within a reasonable time, the claimant may apply to the court of the district in which the seizure has been made, and such court (after giving the United States attorney for such district reasonable notice and opportunity to be heard) shall by order, unless good cause to the contrary is shown, specify a district of reasonable proximity to the claimant's principal place of business, to which the case shall be removed for trial."

No. 214

FILED
JUL 20 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

NATALIE ORTIZ TORRES,

Petitioner,

against

HONORABLE LAWRENCE E. WALSH,
United States District Judge,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

WALTER X. CONNOR,
Counsel for Respondent, Honorable Lawrence E. Walsh, United States District Judge, and for A. H. Bull Steamship Co., Respondent-Claimant in Admiralty Suit.

RICHARD C. RAGSDALE,
Counsel.

Ronald Printing Inc., 20 Thomas St., New York 6, N. Y., U. S. A.

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IN THE

Supreme Court of the United States

NATALIE ORTIZ TORRES,

Petitioner,

against

HONORABLE LAWRENCE E. WALSH,
United States District Judge,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

STATEMENT OF FACTS.

The statement of facts presented by the petitioner is incomplete in that it avoids a statement of the adequate basis on which Respondent ordered the transfer of the basic suit to Puerto Rico.

Petitioner, a longshoreman, who resides at Punta Santiago, Puerto Rico, instituted an admiralty action to recover damages for personal injuries allegedly sustained on the SS. *Rosario* on August 18, 1953 in the port of Humacao, Puerto Rico.

Suit was commenced by petitioner by the service of process on A. H. Bull Steamship Company *in personam*. Subsequently in this same suit petitioner attached the SS. *Rosario in rem*. A. H. Bull Steamship Company appeared

in the *in personam* suit and made claim to the vessel in the *in rem* suit. In accordance with Section 2464 of Title 28, United States Code, an undertaking was given by the claimant and the vessel was released from attachment.

The SS. *Rosario* regularly trades at various ports in Puerto Rico.

At the time of the accident, petitioner was employed as a winchman by the stevedoring firm of Bull Insular Lines of San Juan, Puerto Rico. Petitioner's co-employees, who were witnesses to the accident, were also employees of Bull Insular Line and all reside in Puerto Rico. As a result of the accident on the SS. *Rosario,* the petitioner was hospitalized in a local hospital in Puerto Rico.

A. H. Bull Steamship Company, respondent-claimant, in the admiralty action is a corporation organized and existing under and by virtue of the laws of the State of New Jersey.

Because most of the important witnesses reside in Puerto Rico, where the accident occurred, A. H. Bull Steamship Company moved the Southern District Court to transfer the action to the United States District Court for the District of Puerto Rico under Section 1404 (a) of 28 United States Code for the convenience of parties and witnesses and in the interest of justice.

To show good faith in its motion to transfer to the District Court of Puerto Rico, A. H. Bull Steamship Company agreed to voluntarily appear in the United States District Court of Puerto Rico.

Judge Lawrence E. Walsh, the respondent herein, heard the motion to transfer and filed his opinion granting the motion on condition that a bond or stipulation be filed by the claimant of the SS. *Rosario* which would be subject to any judgment that libelant might recover in the District Court for Puerto Rico. Pursuant to Judge Walsh's opinion such

amended letter of undertaking was given and accepted by the proctors for petitioner. Petitioner thereafter applied to the United States Court of Appeals for the Second Circuit for a writ of mandamus and/or prohibition against Judge Walsh prohibiting the transfer. The Court of Appeals for the Second Circuit, in an opinion which is annexed to the petition (pp. 16-21), denied petitioner's application.

THE PETITION SHOULD BE DENIED BECAUSE; (1) THERE IS NO CONFLICT AMONG THE CIRCUITS REGARDING THE TRANSFER OF AN ADMIRALTY *in rem* ACTION; (2) THE RESPONDENT HAD POWER TO TRANSFER AN ADMIRALTY *in rem* ACTION AND (3) THERE ARE NO EXTRAORDINARY CIRCUMSTANCES JUSTIFYING THE ISSUANCE OF A WRIT OF MANDAMUS AND/OR PROHIBITION.

(1) *There is no conflict among the circuits regarding the transfer of an admiralty in rem action.*

Petitioner attempts to support his application for a writ on the ground of a supposed conflict of the decision below with those of other Courts of Appeal. However, no Court of Appeals has made a decision on the same matter in conflict with that of the court below. The cases relied on by petitioner are not admiralty cases but suits instituted under The Federal Food, Drug and Cosmetic Act [Title 21 United States Code Section 334], a forfeiture statute which by its terms limits the place where suit may be brought. Thus they are completely distinguishable from the basic action and do not conflict with the decision below.

Under the provisions of The Federal Food, Drug and Cosmetic Act, an action is commenced by the condemnation and seizure of the alleged adulterated or misbranded articles in any "district of the United States within the

jurisdiction of which the article is found". Therefore, a requisite to the jurisdiction of the court is that the article be within its territorial jurisdiction and subject to seizure at the time the libel is filed. There is only one district where "an action might have been brought" [28 United States Code 1404(a)] under the provisions of the statute [21 United States Code 334], i.e., the district where the articles are found. Thus, the very words of Section 1404 (a) exclude its application to a forfeiture action.

Explanation of this venue limitation in The Federal Food, Drug and Cosmetic Act cases is found in the cases of *Clinton Foods, Inc.* v. *U. S.*, 188 F. 2d, 289, page 292 (C. A. 4, 1951) and *Fettig Canning Co.* v. *Steckler*, 188 F. 2d 715, page 718 (C. A. 7, 1951). These are the only cases relied on by petitioner in his attempt to manufacture a conflict of decisions. These decisions are not in any way in conflict with the decisions below.

Admiralty jurisdiction, however, is entirely different. It is permissible to file a libel *in rem* prior to the vessel's (the *res*) entry into the territorial jurisdiction of the court. In fact, this is exactly what petitioner did in this action in the district court. After the mere filing of a libel, the court obtains an incomplete or inchoate jurisdiction. Thereafter, if the vessel appears within the jurisdiction, a monition may be issued and the vessel seized. Thus, in admiralty, it is possible to institute a proceeding in a district court where the *res* is not yet situated, but where it may come. It is not mandatory that before the action may be instituted that the *res* (vessel) be found in the district as is required by The Federal Food, Drug and Cosmetic Act. In addition, this Act calls for seizure and forfeiture of the adulterated or misbranded articles. It is, in effect, a penal statute. Seizure under this Act is for purposes of confiscation whereas, in admiralty, it is for security. For this

reason as well as that stated above, cases arising under The Federal Food, Drug and Cosmetic Act are not in point.

It is not disputed that an *in rem* admiralty action can be instituted where the *res* is situated or about to be situated. Indeed, libels may be filed in a number of district courts where doubt exists as to the ultimate place of arrival of the *res*. However, this does not mean that once instituted it cannot be transferred to a more convenient forum. This is especially true where the only *res* before the court is a bond (or, as here, a letter of undertaking), and the action is one, not for forfeiture or seizure, but merely for money damages.

(2) *The Respondent Had Power to Transfer an Admiralty in rem Action.*

In *Ex Parte Collett,* 337 U. S. 55 (1949), this Court, in effect, recognized Professor James W. Moore as the author of Section 1404 (a). With regard to the question raised by petitioner as to the application of Section 1404 (a) to admiralty actions, Professor Moore, in *Moore's Commentary on the U. S. Judicial Code* stated that 1404 (a) applied to all actions of a non-criminal nature including admiralty actions. He said (p. 207):

> "Federal Criminal Rule 21 (b) provides for transfer of a criminal case, upon defendant's motion, to any other forum in which the offense was committed if the court is satisfied that 'in the interest of justice' the proceeding should be transferred. Since this deals with the matter of a criminal proceeding, parallels §1404 (a), and because of the derivation of §1404 and the need to blanket the field, the term 'civil action' in §1404 (a) might appropriately be construed to refer to any non-criminal proceeding, including an action in admiralty, not otherwise specifically covered."

This is all-inclusive language and is unqualified with respect to the application of 1404 (a) to "admiralty" cases without distinction as to whether *in rem* or *in personam*. Professor Moore obviously was using the term "admiralty" in the generic sense and contemplated that it should extend to all admiralty actions whether *in rem* or *in personam*.

Professor Moore's forecast was prophetic for in *Arrowhead Co., Inc.* v. *The Aimee Lykes, et al.*, 101 F. Supp. 895 (SDNY 1950) appeal dismissed, 193 F. 2d 83 (C. A. 2, 1951) the Second Circuit held that Section 1404 (a) applied to admiralty cases. To the same effect, see *Internatio-Rotterdam Inc.* v. *Honorable Roszel C. Thomsen*, 218 F. 2d 514 (C. A. 4, 1955); *St. Paul Fire & Marine Ins. Co.* v. *American Mail Line*, 94 F. Supp. 28 (SDNY 1950) and *Crawford* v. *Ann Arbor R. Co.*, 94 F. Supp. 29 (SDNY 1950).

The attack on the decision below by petitioner illustrates that he is actually seeking a review of an interlocutory order which clearly is not the function of a writ of mandamus. The basis of the petitioner attack i.e., the supposed legislative history of Section 1404 (a) of Title 28 United States Code is erroneous as this Court in *Norwood* v. *Kirkpatrick* (decided April 11, 1955) held, in effect, that the section was new, not based on any early sections of the Statute and was a broad revision of pre-existing law. The claim that the District of Puerto Rico is not one where the action "might have been brought" is without foundation as it has been held that where the defendant or respondent consents to the transfer of an action to another district the action "might have been brought" in that district. *Anthony* v. *Kaufman*, 193 F. 2d 85 (C. A. 2, 1951) cert. denied 342 U. S. 995; *Mire* v. *Esso Shipping Co.*, 112 F. Supp. 612 (SDNY 1953).

(3) *There Are No Extraordinary Circumstances Justifying the Issuance of a Writ of Mandamus and/or Prohibition.*

Nowhere in the petition is there any mention of any extraordinary circumstances which would justify the use of a writ of mandamus. Indeed, any such contention would not be consistent with the facts. It is an uncontroverted fact that the SS. *Rosario* regularly calls at ports in the District of Puerto Rico and could have been arrested by a process *in rem* of that court. Therefore, this action could and should have been brought in Puerto Rico. Although there is a claim *in rem* against the SS. *Rosario* as well as an *in personam* claim against A. H. Bull Steamship Company, the only *res* before the Court is the amended letter of undertaking, so there is no problem of physical transfer of the vessel. The amended letter of undertaking provides that it will be operative in Puerto Rico in case any decree or judgment is obtained there. The letter of undertaking is the only *res* before the Court. The vessel was seized merely as security, and once that security was posted, the vessel was released. The action then proceeds as an ordinary *in personam* admiralty action. The Court of Appeals in its opinion denying petitioner's application for mandamus found:

> "• • • But there is not the slightest basis for holding that either of these cases is 'really extraordinary' or 'extraordinary' in any sense. They are the ordinary, run-of-the-mill type of litigation which goes through the District Courts from day to day."

The petitioner has failed to meet his burden of showing that his right to issuance of the writ is clear and indisputable. See: *Bankers Life & Casualty Co.* v. *Holland Chief Judge,* 346 U. S. 379 at page 384 (1953).

The order of transfer was interlocutory and, therefore, not appealable. However, petitioner under the guise of a writ of mandamus has sought a review of the transfer order. It is axiomatic that a writ of mandamus and/or prohibition may not be used as a substitute for an appeal. The present petition contravenes this axiom. The Court of Appeals' opinion, if in error, which is not conceded, is reviewable only on appeal from a final decree.

This Court in declining to review an order of severance and transfer in *Bankers Life & Casualty Co.* v. *Holland Chief Judge,* 346 U. S. 379 (1953) stated that a writ of mandamus and/or prohibition was inappropriate as the action of the lower court was reviewable on appeal. This Court stated (p. 382):

> "• • • The contention is that in acting on the motion and ordering transfer he (the lower court) exceeded his legal powers and this error ousted him of jurisdiction. But jurisdiction need not run the gauntlet of reversible errors. The ruling on a question of law decisive of the issue presented by Cravey's motion and the replication of the petitioner was made in the course of the exercise of the court's jurisdiction to decide issues properly brought before it. *Ex Parte American Steel Barrel Co.,* 230 U. S. 35, 45-46 (1913); *Ex parte Roe,* 234 U. S. 70, 73 (1914). Its decision against petitioner, even if erroneous—which we do not pass upon—involved no abuse of judicial power, *Roche* v. *Evaporated Milk Assn., supra,* and is reviewable upon appeal after final judgment. If we applied the reasoning advanced by the petitioner, then every interlocutory order which is wrong might be reviewed under the All Writs Act. The office of writ of mandamus would be enlarged to actually control the decision of the trial court rather than used in its traditional function of confining a court to its prescribed jurisdiction."

The Court is also respectfully referred to the case of *Ex Parte Roe*, 234 U. S. 70, page 73 (1914); *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21, page 30 (1943), and *Alcoa S. S. Co., Inc* v. *Ryan et al.*, 211 F. 2d 576, page 577 (C. A. 2, 1954).

The question was one which Judge Walsh had jurisdiction to decide. Petitioner has failed to show any extraordinary circumstances to justify the use of a writ of mandamus and/or prohibition.

Conclusion.

This action was properly transferred to the District Court of the District of Puerto Rico, a jurisdiction where it might have been brought under the provisions of Section 1404 (a) of Title 28 United States Code and there is no conflict with decisions of other circuits. It is submitted that the petition should be denied.

Walter X. Connor,
Counsel for Respondent, Honorable Lawrence E. Walsh, United States District Judge, and for A. H. Bull Steamship Co., Respondent-Claimant in Admiralty Suit.

Roland C. Radice,
Counsel.